UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

IN RE:

TRAVIS CLAYTON WILLIAMS & CALLIE JETT WILLLIAMS,
Debtors.
_____/

CASE NO.: 17-10190-KKS
CHAPTER: 7

SOUTHEASTERN FUNDING PARTNERS, LLLP,
Plaintiff,
v.

TRAVIS CLAYTON WILLIAMS & CALLIE JETT WILLIAMS,
Defendants.
_____/

ADV. NO. 18-01002-KKS

TRAVIS CLAYTON WILLIAMS,
Counter–Plaintiff/Debtor,
v.

SOUTHEASTERN FUNDING PARTNERS, LLLP, and C. FREDERICK THOMPSON,
Counter and Third–Party Defendants.
_____/

ORDER GRANTING *PLAINTIFF'S* [SIC] *MOTION TO DISMISS DEFENDANT'S* [SIC] *COUNTER AND THIRD-PARTY COMPLAINT (DOC. 72) AND MEMORANDUM OF LAW* (DOC. 90)

THIS MATTER came before the Court for hearing on August 1, 2019, on the motion by Plaintiff and Third-Party Defendants, Southeastern

Funding Partners, LLLP ("SFP") and C. Frederick Thompson ("Thompson"), entitled *Plaintiff's Motion to Dismiss Defendant's Counter and Third-Party Complaint (Doc. 72) and Memorandum of Law* ("Motion to Dismiss," Doc. 90), and the memorandum of law in opposition, filed by Defendant/Third Party Plaintiff, Travis Clayton Williams ("Williams").[1] Based on the parties' arguments at the hearing, pleadings, and relevant case law, the Motion to Dismiss is due to be granted as set forth below.

BACKGROUND

Defendant/Third Party Plaintiff, Williams, filed a pleading containing a combined multi-count Counterclaim against SFP and Third-Party Complaint against SFP and Thompson, who allegedly owns SFP.[2] By the Motion to Dismiss, SFP and Thompson seek dismissal of Counts VII, VIII, and IX. Count VII asserts a cause of action for violation of Florida's Consumer Collection Practices Act; Count VIII asserts a claim for damages for willful violation of the automatic stay under 11 U.S.C. § 362(k); and Count IX sets forth a claim for civil conspiracy.

[1] *Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Defendant's Counter and Third-Party Complaint (Doc. 72) and Memorandum of Law (Doc. 90)* ("Response," Doc. 97).
[2] Doc. 72.

DISCUSSION

Motion to Dismiss Standard

In addressing a motion to dismiss, the Court must accept the factual allegations in the complaint as true, and take them in the light most favorable to the claimant.[3] To survive a motion to dismiss, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[4] This standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . ."[5] Thus, the Court engages in a two-step approach: "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[6]

COUNT VII – FCCPA VIOLATION

In Count VII, Williams asserts that SFP and Thompson violated Section 559.72(18) of the Florida Consumer Collection Practices Act ("FCCPA") by directly contacting and communicating with him despite knowing that he was represented by an attorney. SFP and Thompson assert

[3] *Erickson v. Pardus*, 551 U.S. 89 (2007); *Carlson Corp./Southeast v. Sch. Bd. of Seminole Cty. Fla.*, 778 F. Supp. 518, 519 (M.D. Fla. 1991) (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).
[4] Fed. R. Civ. P. 8(a)(2), made applicable by Fed. R. Bankr. P. 7008.
[5] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted).
[6] *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

that they did not violate the FCCPA because Thompson's communication with Williams was merely in response to correspondence initiated by Williams. Regardless, it appears that the FCCPA does not apply to the subject communications.

Section 559.72(18) of the FCCPA provides in relevant part:

> In collecting *consumer debts*, no person shall:
> . . .
> (18) Communicate with a debtor if the person knows that the debtor is represented by an attorney with *respect to such debt* . . . . [7]

The FCCPA defines "debt" or "consumer debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which . . . the subject of the transaction [is] primarily for personal, family, or household purposes . . . ."[8]

Williams describes himself as a "consumer within the meaning of Fla. Stat. § 501.203(7)."[9] He also claims to be a "consumer" and "debtor" as defined by the FCCPA.[10] The alleged facts do not support these claims. Rather, the facts alleged by all parties reflect that the transactions between Williams and SFP, and Williams and Thompson, if any, were commercial

[7] Fla. Stat. § 559.72(18) (West 2010) (emphasis added).
[8] Fla. Stat. § 559.55(6) (West 2016).
[9] Doc. 72, ¶ 144.
[10] *Id.* at ¶ 162.

transactions based on Williams' purchases and borrowing for investment and development, not personal and family purposes.[11]

Williams alleges that he borrowed money through his affiliates from SFP, Thompson, and their affiliates for a land development enterprise. Williams' claims against SFP and Thompson stem from three loans for two development projects: (1) the Cinnamon Hills loan, (2) the Cottage Grove loan, and (3) the loan to refinance the debts on Cinnamon Hills and Cottage Grove. Williams' allegations also relate to separate transactions pertaining to another development: the Cedar Key Plantation. The exhibits attached to Williams' Counterclaim/Third-Party Complaint—particularly the offending email attached as Exhibit G—show that the parties communicated in writing about business debts. That email, which Williams claims demonstrates SFP's improper communication, refers to a parcel of real property ("Cottage Grove Lot 8") that was at one time subject to a

[11] *See Acciard v. Whitney*, No. 2:07-cv-476-UA-DNF, 2008 WL 5120898, at *9 (M.D. Fla. Dec. 4, 2008) (finding plaintiff's claim was due to be dismissed because the FCCPA only applies to consumer debts and plaintiff alleged "that the mortgages [were] properties that [were] being held for investment purposes"); *See also Pelletier v. Estes Groves, Inc.*, No.: 16-14499-CIV, 2018 WL 4208328, at *11 (S.D. Fla. Mar. 28, 2018) (finding dismissal to be appropriate because "the allegations of the operative pleading demonstrate[d] that the debt in question was a commercial debt and not a consumer debt for personal, family, or household purposes."); *Cowley v. Branch Banking and Tr. Co.*, No. 8:10-cv-2263-T-26AEP, 2010 WL 5209366, at * 2 (M.D. Fla. Dec. 16, 2010) (noting that "the face of the guaranty attached as Exhibit B, denote[d] that the credit was extended to a business . . . .").

mortgage in favor of SFP.[12]

Taking the allegations in the Counterclaim/Third-Party Complaint as true and viewing them in the light most favorable to Third-Party Plaintiff, Williams, Count VII does not assert a plausible basis for relief against either SFP or Thompson under the FCCPA. The Motion to Dismiss is due to be granted as to Count VII.

Count VIII – Violation of the Automatic Stay

The filing of a bankruptcy petition operates as an automatic stay which prohibits "any act by a creditor 'to collect, assess or recover a claim against the debtor that arose before the commencement of the case . . .'"[13] The stay is triggered as to all creditors when a bankruptcy petition is filed, "regardless of lack of actual notice of the commencement of proceedings."[14] The "stay relieves the debtor from financial pressure during the pendency of bankruptcy proceedings."[15] The Eleventh Circuit has held that a violation of the stay is willful if the offending party: "(1) knew the automatic stay was invoked and (2) intended the actions which violated the

[12] *Id.* Ex. G.
[13] 11 U.S.C. § 362(a)(6) (2019); *In re Draper*, 237 B.R. 502, 505 (Bankr. M.D. Fla. 1999).
[14] *Thompson v. CitiMortgage, Inc.*, No. 1:14-cv-02528-AT-AJB, 2015 WL 11578454, at *6 (N.D. Ga. Jan. 12, 2015) (citing *Mueller v. Nugent*, 184 U.S. 1, 14 (1902) ("noting that the filing of bankruptcy petition operates as notice to all the world of the pendency of proceedings and as an injunction restraining all persons from meddling with the bankrupt's property")).
[15] *Carver v. Carver*, 954 F.2d 1573, 1576 (11th Cir. 1992).

stay."[16]

In Count VIII, Williams asserts that Thompson willfully violated the automatic stay by making threats against him days before he filed bankruptcy.[17] Because there can be no stay violation before the stay becomes effective, this portion of Count VIII fails to state a cause of action.

In the same count, Williams also alleges that Thompson and SFP attempted to collect pre-petition debt after he filed bankruptcy, with knowledge of the bankruptcy filing. Here, Williams claims that the email exchange between him and Thompson, attached to the Third-Party Complaint as Exhibit G, constitutes a willful stay violation. This portion of Count VIII states a plausible cause of action for willful violation of the automatic stay.

SFP and Thompson argue that there was no violation of the automatic stay because they were merely responding to correspondence initiated by Mr. Williams. This argument is not supported by case law. Some courts have held that responsive "letters or statements, including the lender's position and the status of the loan, should not be construed as an improper

[16] *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1555 (11th Cir. 1996).

[17] Williams seeks damages under Section 362(k) of the Bankruptcy Code against both Thompson and SFP, contending that because Thompson is an agent of SFP and acted within the scope and authority of that agency, his actions should be imputed to SFP.

demand for payment."[18] Other courts have held differently based on creditors' apparent motives. In *In re Draper*, a Florida bankruptcy court found that a creditor willfully violated the automatic stay by taking steps designed to pressure the debtor into paying a debt.[19] The creditor in *Draper* sent invoices to the debtor post-petition; the invoices noted they were informational only, acknowledged debtor was in bankruptcy, but also advised debtor of his delinquency and requested payment.[20] The Bankruptcy Court for the Middle District of Florida found that the invoices improperly sought payment from the debtor, despite the creditor's attempt to include exculpatory language.[21] The court concluded that the automatic stay can be violated even "when the creditor did not plainly ask for payment from the debtor . . . [if] . . . the creditors' actions were designed to place pressure on the debtor to pay the debt."[22] Similarly, in *In re Sullivan*, the debtor sold real property, after which the creditor refused to release an abstract of title until the debtor paid the creditor's "Bankruptcy Attorney Fees."[23] The New York bankruptcy court found that the inclusion of the

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[18] *Gordon v. Taylor (In re Taylor)*, 430 B.R. 305, 312 (Bankr. N.D. Ga. 2010) (citing *In re Redmond*, 380 B.R. 179, 186-87 (Bankr. N.D. Ill. 2007); *In re Mosby*, 244 B.R. 79, 87 n. 13 (Bankr. E.D. Va. 2000); *In re LaFave*, 9 B.R. 859 (Bankr. E.D. Mich. 1981)).
[19] *In re Draper*, 237 B.R. 502 (Bankr. M.D. Fla. 1999).
[20] *Id.* at 504.
[21] *Id.* at 505.
[22] *Id.* at 505-06.
[23] *In re Sullivan*, 367 B.R. 54, 57-58 (Bankr. N.D.N.Y. 2007).

bankruptcy attorney fees in the payoff letter, coupled with the creditor's refusal to allow closing to proceed unless debtor paid those fees, was a willful violation of the automatic stay.[24]

Whether SFP was obligated to release Cottage Grove Lot 8 from its mortgage is unclear, because the pleadings do not show whether Williams had paid that mortgage obligation in full when the parties exchanged their post-petition correspondence.[25] But for purposes of this ruling, it makes no difference. The email response to Williams' request for a release may still have amounted to a willful stay violation. Rather than simply say that no release would be forthcoming, the responsive email demanded that Williams "live up to [his] commitments."[26]

SFP and Thompson deny that the referenced email was designed to put pressure on Williams for payment. But, one can easily discern that the opposite might be true. That is a fact for proof at trial. Williams has alleged enough facts pertaining to the parties' post-petition email communications to state a cause of action for willful violation of the automatic stay under

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[24] *Id.* at 63.

[25] Williams implies that he had paid off the loan secured by Cottage Grove Lot 8 by contending that he had a statutory entitlement to a written satisfaction and release under Fla. Stat. § 701.04(2), which states, in part: "Whenever the amount of money due on any mortgage, lien, or judgment has been fully paid . . . the mortgagee, creditor, or assignee, or the attorney of record in the case of a judgment, to whom the payment was made, shall execute in writing an instrument acknowledging satisfaction of the mortgage . . . . "

[26] Doc. 72. Ex. G.

Section 362(k).

Count IX – Civil Conspiracy

In Count IX, Williams alleges civil conspiracy between Thompson and SFP based on his rather confusing theory that Thompson acted as an agent for himself, and that SFP acted as an agent for Thompson. Williams provides no legal support for his assertion that Thompson could act as an agent for himself, and case law supports no such theory.[27]

In response to Count IX, Thompson and SFP correctly assert that (1) the general rule is that a corporate owner or officer cannot conspire with the corporation; and (2) Williams has failed to join necessary parties in order to prove that the personal interest exception to the general rule is present here.

To plead a civil conspiracy cause of action in Florida, a claimant must show: "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy."[28] Florida courts have rejected the notion

[27] *See Solyom v. World Wide Child Care Corp.*, Case No. 14-80241-CIV, 2015 WL 6167411, *1 (S.D. Fla. Oct. 15, 2015) (noting "[it] is not legally possible for an individual to conspire with himself . . .").

[28] *Lipsig v. Ramlawi*, 760 So. 2d 170, 180 (Fla. 3d DCA 2000) (quoting *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997) (citations omitted), rev. denied, 717 So.2d 531 (Fla. 1998)).

that a corporation can conspire with its employee or agent, finding that "the intra-corporate conspiracy doctrine, as a general proposition, precludes the claim of conspiracy against individuals and their corporation for wholly internal agreements to commit wrongful or actionable conduct."[29]

Courts within Florida have found two exceptions to the intra-corporate conspiracy doctrine. The first exception is "where 'the agent [or employee] has a personal stake in the activities that are separate and distinct from the corporation's interest.'"[30] The second exception to the doctrine "manifests where separate legal entities are involved in the alleged conspiracy."[31]

Williams alleges that Thompson's actions fall under the personal stake exception because Thompson was profiting off the conspiracy through other affiliated entities. In the Motion to Dismiss, SFP and Thompson argue that in order to prove that the personal-stake exception is applicable, Williams must join all entities controlled by Thompson that loaned money to Williams.

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[29] *Mancinelli v. Davis*, 217 So. 3d 1034, 1037 (Fla. 4th DCA 2017*); See also Cedar Hills Props. Corp. v. E. Fed. Corp.*, 575 So. 2d 673, 676 (Fla. 1st DCA 1991) (finding "[s]ince a corporation is a legal entity which can only act through its agents, officers and employees, a corporation cannot conspire with its own agents . . .").

[30] *Lipsig*, 760 So. 2d at 181 (citing *Cedar Hills Props. Corp.*, 575 So. 2d at 676; *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So. 2d 252, 256 (Fla. 3d DCA 1993)).

[31] *Rossi v. Darden*, Case No. 16-21199-CIV-ALTONAGA/O'Sullivan, 2016 WL 11501449, at *8 (S.D. Fla. July 19, 2016).

Rule 19 of the Federal Rules of Civil Procedure, applicable to this adversary proceeding by Fed. R. Bankr. P. 7019, sets forth the standard for joinder of parties. The Eleventh Circuit has held that in a Rule 19 analysis, "[t]he first question is whether complete relief can be afforded in the present procedural posture, or whether the nonparty's absence will impede either the nonparty's protection of an interest at stake or subject parties to a risk of inconsistent obligations."[32] The court is then to determine whether "in equity and good conscience," the action should proceed as cast.[33] A court should proceed to the second inquiry only if the first question is answered in the affirmative and the nonparty cannot be joined.[34]

Williams alleges that his claim is cognizable under the personal stake exception to the intra-corporate conspiracy doctrine because Thompson had wholly independent interests in achieving the object of the conspiracy, outside of his SFP corporate capacity. Taking these allegations as true, Count IX may assert a plausible cause of action under the personal stake exception to the intra-corporate conspiracy doctrine, if all required parties

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[32] *City of Marietta v. CSX Transp.*, Inc. 196 F.3d 1300, 1305 (11th Cir. 1999) (citing Fed. R. Civ. P. 19(a)(1)-(2)).

[33] *Id.*

[34] *Id.* Fed. R. Civ. P. 19(b) states: "[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed . . . ."

are joined. Joinder of the affiliated entities appears feasible. Because not all required entities have been made parties to this suit and it appears feasible to join the required entities, the Motion to Dismiss is due to be granted as to Count IX, with leave to amend and join all required parties.

For the reasons stated, it is

ORDERED:

1. *Plaintiff's* [sic] *Motion to Dismiss Defendant's* [sic] *Counter and Third-Party Complaint (Doc. 72) and Memorandum of Law* (Doc. 90) is GRANTED as follows:

    a. The Motion to Dismiss is GRANTED, without prejudice, as to Count VII.

    b. As to Count VIII, the Motion to Dismiss is:

        I. GRANTED with prejudice for failure to state a claim as to all pre-petition acts alleged; and

        II. GRANTED without prejudice as to allegations of post-petition email communications, with leave to amend Count VIII to re-allege a claim limited to post-petition communications

    c. The Motion to Dismiss is GRANTED, without prejudice, as to Count IX, with leave to amend and join all required parties.

2. Williams shall have fourteen (14) days from the date of this Order to file an amended Counterclaim/Third-Party Complaint consistent with this ruling.

DONE and ORDERED on October 3, 2019.

KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

Attorney for SFP and Thompson is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of entry of this Order.